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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ALLEN ROBERTS,

Defendant and Appellant.

G031690

(Super. Ct. No. 02WF0052)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas James Borris, Judge. Affirmed.

Sandra Uribe, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gary W. Brozio and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Robert Allen Roberts appeals from his convictions for assault with a weapon on an officer (Pen. Code, § 245, subd. (c)) and felony evading an officer

(Veh. Code, § 2800.2). He contends the court erred in failing to instruct the jury with CALJIC No. 2.28 in connection with a video tape introduced in evidence. He further requests this court to review the in camera proceedings and records reviewed by the trial court with respect to his denied *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531). The trial court did not abuse its discretion in refusing to give the requested jury instruction, and our review of the transcript of the in camera proceedings does not demonstrate any error in the court's denial of the *Pitchess* motion. Therefore, we affirm.

FACTS

After an automobile chase, defendant was arrested and booked into the Huntington Beach jail. He was uncooperative, hostile, and engaged in offensive conduct. While being accompanied to the shower, he was instructed to face the wall to permit the officer to unlock a gate at the shower area. Defendant failed to comply with the directive, placed his right shoulder to the wall, and kept his right arm bent while holding his sleeve cuff with his left hand. He then reached into his sleeve and pulled out an object, later identified as a shank made out of a plastic booking cell placard. Defendant then turned towards one of the officers, raised the hand holding the shank above his shoulder, and ran towards the officer while making a slashing motion towards the officer's face. After a struggle that resulted in injuries to one of the officers, defendant was subdued.

Video cameras, scattered throughout the jail recorded some of the events. These cameras produced frames consisting of still photographs taken at 30-45 second intervals. The frames introduced in evidence showed defendant in his booking cell, his reaching out of the cell, and the officers moving him out of the cell. A subsequent frame showed the placard normally located next to the cell was no longer there. Another frame showed defendant standing with his right arm against a wall. Two other frames showed, respectively, an officer on top of defendant and defendant being dragged into a cell.

Defendant testified he took a cell sign, broke off an edge, and sharpened it (allegedly solely because he was bored). He also acknowledged carrying the broken sign in his sleeve, but denied attempting to slash the officer. Rather, he claimed, he was pushed, punched, pummeled, and pepper-sprayed after he attempted to walk back to his cell.

DISCUSSION

The Trial Court Did Not Abuse Its Discretion In Failing To Instruct With CALJIC No 2.28

The video tapes furnished to defendant's lawyer before the trial differed in some respects from the video tapes introduced at the trial. Defendant contended that the tape furnished before the trial was of inferior quality and did not contain the final frame showing defendant being dragged into a cell after the altercation. He requested the court instruct the jury with CALJIC No. 2.28 as a sanction for what he contended was the prosecution's failure to make proper discovery. The trial court refused the request. The requested instruction would have advised the jury of the parties' duty to disclose evidence intended to be introduced at trial and that any concealment was unjustified and might be considered by the jury.

First, as to the quality of the video tape. It is common knowledge that when video tapes are reproduced, subsequent copies will not be of the same quality as the original. Neither in the trial court nor here does defendant contend he was prejudiced by the allegedly poorer quality of the tape furnished to him. He does not argue that the tape furnished to him was of such a poor quality that he was unable to view material evidence that was relevant during the trial.

Next, the so-called missing frame, the final frame of the tape introduced at trial, showed defendant being returned to a cell after the altercation. By the time that

photograph was taken, the attack, the basis of defendant's conviction, was over. Again, neither in the trial court nor here does defendant advance any argument that the evidence disclosed in the final frame was relevant to any issue in the case.

Finally, and for the first time in this court, defendant argues the fact that the last frame had not been included in the tape furnished to his lawyer is evidence of tampering. If defendant had any evidence of such misconduct, it should have been presented to the trial court either during the trial or in a motion for a new trial. None was presented there, and none has been called to our attention.

As defendant acknowledges in his opening brief, in *People v. Zamora* (1980) 28 Cal.3d 88, our Supreme Court noted that "suppression of evidence immaterial to the charge invokes no sanction [citation]." (*Id.* at p. 100.) Here the discrepancies between the two tapes were insignificant and immaterial to the crimes with which defendant was charged. Defendant has been unable to demonstrate that there were *material* differences between the two tapes. Under these circumstances the trial court was well justified in denying defendant's request the jury be instructed with CALJIC No. 2.28.

The Transcript of the Pitchess Hearing Fails To Disclose Any Error By the Trial Court

Because of the discrepancies between defendant's version of the altercation and that of the four officers present during the altercation, defendant made a *Pitchess* motion (*Pitchess v. Superior Court, supra*, 11 Cal.3d 531). The trial court reviewed records pertaining to the officers in chambers in the presence of a Huntington Beach deputy city attorney and a sergeant in the Huntington Beach police department. Defendant asks us to review both the in camera proceedings and the documents reviewed by the court. Since these documents are not part of the record, we are unable to review them. But the transcript of the in camera inspection discloses that the court reviewed the requested documents and either the judge or the others present described their contents.

Although retention of the documents examined would have been preferable, this procedure is adequate. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.)

From a review of the descriptions of the records reviewed in camera, we conclude the trial court properly denied the *Pitchess* motion. None of the records contained relevant complaints or other evidence of the type of bad acts defendant would have been able to use to challenge the officers' credibility. The trial court did not abuse its discretion by denying the discovery motion.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.